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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. THOMAS ELLIS EDWARDS, Defendant and Appellant.	G026878 (Super. Ct. No. 98NF3434) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Meagan J. Beale and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Thomas Ellis Edwards of petty theft with a prior and possessing a controlled substance.[1] It also found he had suffered two prior strike convictions and served three prior prison terms. On appeal, he contends the

* Pursuant to California Rules of Court, rule 976(b) and 976.1, this opinion is certified for publication with the exception of parts I through V.

[1] The jury acquitted Edwards of receiving stolen property, which was charged as an alternative count to the theft offense.

court erred by: (1) denying him the opportunity to challenge the admissibility of his confession outside the presence of the jury; (2) refusing to sever the charges; (3) instructing with CALJIC No. 2.15; and (4) sentencing him to 25 years to life in prison. He also contends the prosecutor committed misconduct in closing argument, and the Three Strikes law is unconstitutional. Finding no merit to these contentions, we affirm the judgment.

* * *

Late one evening, Fullerton Patrol Officer William Kendrick, Jr. saw Edwards driving in a strip mall with his lights off. Because all of the stores in the mall were closed, Kendrick contacted him to see what he was up to. While they were talking, Edwards consented to a search of his vehicle. In it, Kendrick found two knives, an axe, a flashlight, a cutting torch, and an Uzi-style toy gun. He also found a variety of tools, including a sledgehammer, a prying device, and two pairs of bolt cutters.

Further investigation by Kendrick uncovered the fact that the vehicle identification number on Edwards' vehicle did not correspond to the license plate number. When Kendrick examined the license plate, he noticed another one underneath it covered with tape. The taped plate was the original and the other one was stolen. Following this discovery, Kendrick arrested Edwards on suspicion of burglary and took him into custody.

At the stationhouse, Police Officer Brian Cox questioned Edwards after reading him his *Miranda* rights. Edwards admitted he was as on the prowl to commit a burglary when Kendrick stopped him. He explained the tools in his vehicle were for breaking into things, and the weapons were for protection. Edwards also admitted he had pilfered the stolen license plate that was found on his vehicle. He said the stolen plate would help him avoid apprehension during a burglary because if someone reported the plate's number to the police it would "not come back to him." When Cox asked Edwards about drugs, he said he had used methamphetamine two days earlier.

Armed with this information, Police Officer Michael Montgomery and Parole Officer David Lopez searched Edwards' apartment the following day. In the bedroom, Montgomery found a baggie containing methamphetamine and Lopez found some used syringes. They also found a large pair of bolt cutters in the room.

Montgomery and Lopez then paid Edwards a visit in jail. After reminding him his *Miranda* rights were still in effect, they questioned him about the items found in his house. According to Montgomery, Edwards admitted they were his. He also said he had lied to Cox about stealing the license plate. However, later in the interview he flip-flopped again and told Montgomery he did in fact steal the plate.

At trial, Edwards testified he was being pursued by gang members shortly before Kendrick stopped him. He said that during the chase he suddenly remembered he had an extra license plate in his vehicle that he had found. Fearing his pursuers would use his license plate number to obtain his address, he pulled over and affixed the extra plate to his bumper. He explained this to Kendrick, but the officer did not seem interested. Later, at the police station, Cox told him he would keep him there all night until he confessed to burglary. Eventually, he admitted the tools found in his vehicle could be used to commit burglary. As for the contraband found in his house, he admitted the syringes were his. However, he insisted there were no drugs in his house at the time of the search. He also said that he told this to Lopez and Montgomery when they interviewed him in jail.

Lopez testified that he and Montgomery searched different parts of Edwards' bedroom. He discovered the syringes, and Montgomery found something else, but he did not remember what it was. Regarding the jail interview, Lopez testified he did not hear Edwards confess to stealing the license plate or possessing methamphetamine. But then again, he was not present during the entire interview.

I

Edwards contends the court erroneously denied him the opportunity to challenge the voluntariness of his confession to Officer Cox outside the presence of the jury. The record does not support this contention.

On the day of trial, Edwards made an oral request for a hearing outside the presence of the jury to litigate the admissibility of his statements to Cox. The court denied the request, telling Edwards he was free to raise the issue during trial. The court said it would grant a mistrial if Edwards were able to prove his statements were coerced.

If nothing more had been said on the matter, Edwards' claim would be valid, for the law requires the court to adjudicate the admissibility of a confession out of the jury's presence if any party so requests. (Evid. Code, § 402, subd. (b).) But as it turns out, there was much more discussion on this issue.

After denying Edwards' request for a hearing, the court admonished the parties not to bring up any evidence that would reveal to the jury that Edwards was facing a life sentence. At that point, defense counsel represented that Cox had threatened Edwards during his interrogation by alluding to the fact he was "looking at 25 to life." Counsel wanted to elicit this evidence from Cox to show how it affected Edwards' decision to confess. The prosecution then proposed that the parties be allowed to voir dire Cox outside the presence of the jury to determine the admissibility of Edwards' statements.

The court was agreeable to that. It said, "We will bring [Cox] in a little early . . . and we will see what he says outside the presence [of the jury]." Despite having requested this very procedure moments earlier, defense counsel suddenly opposed it on the ground it would deprive the jury of the chance to evaluate Cox's credibility. Nonetheless, the court stated it would allow defense counsel "the opportunity to have the officer ahead of time" in order to show Edwards' confession was illegally coerced. Despite the court's offer, Edwards did

not seek to voir dire Cox on this issue. He did object to Cox's trial testimony on the ground of voluntariness, but the court overruled the objection.

While recognizing the court changed its mind in terms of allowing him to question Cox outside the presence of the jury, Edwards argues the court's reversal was ineffective to cure its earlier mistake because it arose while the court was discussing a different topic with the parties, i.e., the need to avoid raising the issue of punishment before the jury. However, we fail to see how this really matters. Once defense counsel alleged that Cox mentioned Edwards' potential punishment while interrogating him, it was readily apparent that all of the issues were back on the table. The question as to how the parties should be permitted to question Cox was thoroughly discussed, and it was ultimately determined that the officer would be made available for questioning outside the presence of the jury so that Edwards could challenge the admissibility of his confession. That is what Edwards originally asked for, and that is precisely what the court gave him permission to do. By failing to take advantage of this offer, Edwards forfeited his rights under Evidence Code section 402.

II

Next, Edwards argues the drug charge and the theft charge were not properly joined, and even if they were, the court abused its discretion in denying his request to sever them. We find the charges were properly adjudicated in a single trial.

Joinder of multiple charges "prevents repetition of evidence and saves time and expense to the state as well as to the defendant. [Citations.]" (*People v. Scott* (1944) 24 Cal.2d 774, 778-779.) To that end, Penal Code section 954 allows separate charges to be filed and tried together if they are "connected together in their commission." Even crimes that are committed at different times and places may be connected together in their commission if they are linked by a common element of substantial importance. (*People v. Mendoza* (2000) 24 Cal.4th 130, 160.)

Here, the common element underlying the charged offenses was Edwards' drug use. Shortly after Edwards was arrested on suspicion of burglary, Cox questioned him about drugs in order to establish a motive. Sure enough, Edwards admitted using methamphetamine two days earlier. This prompted a search of Edwards' apartment, which turned up methamphetamine and a pair of used syringes. Based on this discovery, the prosecution was able to argue that Edwards' drug habit gave him an economic motive to steal. In that sense, the offenses were truly linked together in that one provided the motive for the other. As such, they were properly joined.

"When, as here, the statutory requirements for joinder are met, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion in denying the defendant's severance motion. [Citations.]"(*People v. Mendoza, supra*, 24 Cal.4th at pp. 160-161.) Prejudice may be shown if evidence supporting the respective counts is not cross-admissible (*id*. at p. 161), but the evidence of Edwards' drug possession would have been cross-admissible to prove his motive to commit the theft offense. (See *People v. Hayes* (1999) 21 Cal.4th 1211, 1261-1263; *People v. Felix* (1994) 23 Cal.App.4th 1385, 1392-1394.) Not only that, the evidence on each of the counts was equally strong, so there was little danger of any spillover effect that might have affected the outcome. (*People v. Mendoza, supra*, 24 Cal.4th at p. 161.)

In assessing prejudice, it is also worth noting that Edwards opposed a bifurcated trial on the prior strike and prison term allegations. This permitted the jury to hear evidence about two prior burglaries he committed and his prison record. In light of this, it can hardly be said that a joint trial was prejudicial. Considering all the circumstances, the trial court did not abuse its discretion in denying Edwards' severance motion.

III

Edwards also contends the prosecutor committed several acts of misconduct during closing argument. First, he complains about the fact the

prosecutor told the jury the officers would be guilty of perjury and lose their jobs if they were lying. He contends this brought unsworn testimony before the jury and effectively resulted in the prosecutor vouching for the officers' testimony. But Edwards did not object to this argument below. Nor has he demonstrated that a timely admonishment would have been ineffective to remedy the alleged misconduct. He has therefore waived his right to challenge this aspect of the prosecutor's argument. (*People v. Benson* (1990) 52 Cal.3d 754, 794.)

Edwards did object to the prosecutor's remark that it is not uncommon in criminal cases for the defense to accuse the police of not telling the truth. However, by failing to articulate the basis of this objection, he deprived the prosecution of sufficient information to meet the objection. The waiver rule applies with equal force in this situation. (*People v. Crittenden* (1994) 9 Cal.4th 83, 146; *People v. Price* (1991) 1 Cal.4th 324, 481.)

Lastly, Edwards renews his objection that the prosecutor shifted the burden of proof by telling the jury that it would have to find the officers were lying in order to reach a verdict of not guilty. In fact, this argument merely reminded the jury that there were two conflicting versions of evidence in the case, and that in order to acquit Edwards it would have to accept the defense testimony and reject the officers' testimony. Framing the issue this way did not shift the burden of proof or otherwise constitute misconduct.

IV

Edwards asserts the court violated his due process rights by giving CALJIC No. 2.15. Particularly, he claims the instruction permitted the jury to draw an inference of guilt that lacked evidentiary support. The claim is not well taken.[2]

Pursuant to CALJIC No. 2.15, the court instructed the jury, "[I]f you find [Edwards] was in conscious possession of recently stolen property, the fact of

[2] Although Edwards did not object to the instruction, we review his claim insofar as he claims the instruction infringed his substantial rights. (Pen. Code, § 1259.)

that possession is not by itself sufficient to permit an inference [he] is guilty of the crime of . . . theft [or] receiving stolen property. Before guilt may be inferred, there must be corroborating evidence tending to prove [Edward's] guilt. However, this corroborating evidence need only be slight, and need not by itself be sufficient to warrant an inference of guilt. [¶] As for corroboration, you may consider the attributes of possession, time, place and manner, that [Edwards] had an opportunity to commit the crime[s] charged, [Edwards'] conduct, his false or contradictory statements, if any, and any other statements he may have made with reference to the property or any other evidence which tends to connect [him] with the crime[s] charged."

As explained in *People v. Esquivel* (1994) 28 Cal.App.4th 1386, "[T]he inference permitted by CALJIC No. 2.15 is permissive, not mandatory. [Citation.]" (*Id*. at p. 1400.) It allows the jury to infer guilt from the defendant's possession of recently stolen property only if there is some corroborating evidence tending to connect the defendant with the crime charged. Such an inference comports with due process unless there is no rational way to support it. (*Id*. at p. 1401.)

Here, there was ample evidence to justify that inference. For starters, Edwards was caught red-handed with the stolen license plate affixed to his vehicle. The plate was covering his true license number, so as to make it easier for him to avoid apprehension when carrying out burglaries. In addition, Edwards flat out confessed to two different police officers that he stole the plate. While he changed his story at trial, the corroborative evidence was clearly sufficient to support an inference of guilt based on his possession of the stolen property. Thus, there was a sufficient evidentiary foundation for CALJIC No. 2.15.

Edwards also maintains the instruction singled out inculpatory evidence for special consideration and discouraged the jury from considering other, exculpatory evidence. Although the instruction lists certain factors that the jury may consider in deciding whether the corroborating evidence is sufficient, it

does not mandate consideration of these factors to the exclusion of others. Contrary to Edwards' claims, the jury was free to consider exculpatory evidence in deciding whether to apply the inference set forth in CALJIC No. 2.15.

Edwards would also have us believe the instruction undermines the prosecution's burden of proof because it applies when the evidence against the defendant is slight. We are not convinced. The term "slight" in CALJIC No. 2.15 merely refers to the amount of corroborative evidence that is legally required to apply the inference. It does not refer to the burden of proof that the prosecution must ultimately carry in order to obtain a conviction. That burden was conveyed to the jury by CALJIC No. 2.90, which states that each element of a charged offense must be proven beyond a reasonable doubt. No confusion could have resulted under these circumstances. (See generally *People v. Hernandez* (1995) 34 Cal.App.4th 73, 81 [CALJIC No. 2.15 does not undercut the presumption of innocence]; *People v. Gamble* (1994) 22 Cal.App.4th 446, 454-455 [same].)

Finally, we cannot lose sight of the fact that by cautioning that mere possession of stolen property is insufficient to support a conviction, the instruction benefited Edwards by protecting him "from unwarranted inferences of guilt based solely on possession of property stolen in the charged offense." (*People v. Holt* (1997) 15 Cal.4th 619, 677; see also *People v. Mendoza, supra,* 24 Cal.4th at pp. 176-177 [instruction "favors" the defendant].) In fine, we do not believe the instruction infringed Edwards' rights in any way. (See *People v. Smithey* (1999) 20 Cal.4th 936, 975-979; *People v. Johnson* (1993) 6 Cal.4th 1, 36-38; *People v. Esquivel, supra,* 28 Cal.App.4th at pp. 1400-1401.)

V

Edwards argues his sentence of 25 years to life is cruel and unusual because his crimes were relatively minor, he has never committed a violent offense, and he "made a concerted effort to change his character and behavior" after his last bout in prison. Unfortunately, as this case shows, that effort failed.

Considering all the relevant circumstances, we are convinced Edwards' sentence is constitutional.

The determination of appropriate punishment for a particular offense is a uniquely legislative function which the courts may not second-guess unless the penalty prescribed is found to be cruel or unusual. (*People v. Dillon* (1983) 34 Cal.3d 441, 477-478.) In abstract terms, the test is whether the punishment is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 421-424, fn. omitted; see also *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (opn. of Kennedy, J.) [sentence must be "grossly disproportionate" to crime to violate federal Constitution].) Proportionality is assessed by examining: (1) the offense and the defendant's background; (2) more serious offenses in California; and (3) similar offenses in other jurisdictions. (*Id*. at pp. 429-438.)

With respect to the first factor, Edwards goes to great lengths to downplay the seriousness of his current offenses. However, he largely overlooks his sentencing was based not only on the current crimes but his lengthy criminal history. "The purpose of a recidivist statute . . . [is] to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he [or she] has demonstrated over a period of time during which he [or she] has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction." (*Rummel v. Estelle, supra,* 445 U.S. at pp. 284-285.)

Edwards, now 51 years old, has been involved in criminal activity since his teens. He started out by committing minor drug offenses (possession and

driving under the influence) and has since graduated to more serious crimes. In 1987, he was convicted of three counts of residential burglary and forgery and one count of grand theft. He was sentenced to six years in prison, but it apparently did little good. Upon being paroled in 1991, he promptly reoffended by committing a series of car thefts. During one of the heists he was found in possession of two sawed-off shotguns. That landed him back in prison for another three years. In 1994, he was convicted of two counts each of grand theft, unlawful taking of a vehicle, and receiving stolen property. He was also convicted of evading arrest for leading the police on a lengthy high-speed chase through the streets of Orange County. For this, he received yet another prison term.

As the present case illustrates, Edwards' penchant for criminal activity has not subsided. While he has made some attempts to overcome his drug problem, the probation report reflects they have been spotty at best. In fact, following his latest release from prison Edwards "chose to leave a sober living program and move out on his own with subsequent negative results," i.e., he returned to his old lifestyle of drugs and crime. Even more disheartening is that Edwards has shown little remorse for his actions. He clearly has "demonstrated the necessary propensities" warranting an extended commitment.

Nonetheless, Edwards argues his sentence is disproportionate compared to more culpable offenders, such as second degree murderers. However, "a comparison of [Edwards'] punishment for his current crimes with the punishment for other crimes in California is inapposite since it is his recidivism in combination with his current crimes that places him under the [T]hree [S]trikes law. Because the Legislature may constitutionally enact statutes imposing more severe punishment for habitual criminals, it is illogical to compare [Edwards'] punishment for his 'offense,' which includes his recidivist behavior, to the punishment of others who have committed more serious crimes but have not qualified as repeat felons." (*People v. Ayon* (1996) 46 Cal.App.4th 385, 400, fn. omitted, overruled on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585,

593-595.) In other words, the Three Strikes law is inherently proportional because all defendants with two prior strikes are treated similarly. We therefore find no intrastate disproportionality.

Finally, a review of other jurisdictions' recidivist statutes reveals the punishment imposed by the Three Strikes law is not uncommon. For example, repeat offenders are subject to life imprisonment in Alabama, Delaware, Indiana, Mississippi, South Carolina, Vermont, Washington, West Virginia and Wyoming. (See Ala.Code, § 13A-5-9; Del.Code Ann., tit. 11, § 4214; Ind.Code, § 35-50-2-8.5; Miss.Code Ann. § 99-19-83; S.C.Code Ann. §§ 17-25-45; Vt.Stat.Ann., tit. 13, § 11; Wash.Rev.Code Ann., § 9.92.090; W.Va.Code, § 61-11-18; Wyo.Stat., § 6-10-201.) Because "California's Three Strikes scheme is consistent with the nationwide pattern of substantially increasing sentences for habitual offenders" (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1416, disapproved on other grounds in *People v. Dotson* (1997) 16 Cal.4th 547, 559-560, fn. 8), there is no interstate disproportionality either. (*Ibid*.; see also *Rummel v. Estelle*, *supra*, 445 U.S. 263 [Texas recidivist statute requiring life imprisonment upon conviction of a third felony does not violate federal Constitution].)

We are aware that the Ninth Circuit Court of Appeals has recently found life sentences imposed under the Three Strikes law cruel and unusual. (See *Brown v. Mayle* (9th Cir. 2002) __ F.3d __; *Andrade v. California* (9th Cir. 2001) 270 F.3d 743.) But those cases are distinguishable because the defendants therein were convicted only of petty theft with a prior. Edwards, in contrast, was convicted of that offense and the additional felony of possessing a controlled substance. Given this distinction, as well as Edwards' extensive criminal history, we cannot say his sentence shocks the conscious or offends traditional notions of human dignity so as to violate the proscription against cruel and unusual punishment. (See *People v. Ayon*, *supra*, 46 Cal.App.4th at pp. 396-401 [life sentence under Three Strikes law not cruel or unusual]; *People v. Ingram*, *supra*,

40 Cal.App.4th at pp. 1412-1417 [same]; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631 [same].)

VI

Edwards contends the Three Strikes law violates due process and equal protection because it takes into consideration the order in which a defendant's crimes were committed. To wit, the law imposes greater punishment on someone like Edwards, who commits a nonstrike offense after two or more strike offenses, than it does on a defendant who commits such offenses in reverse order, i.e., a defendant whose crimes are of increasing seriousness. According to Edwards, "There is no way to justify such a statutory scheme." Actually, there is.

This same argument was proffered and rejected in *People v. Cooper* (1996) 43 Cal.App.4th 815. There, the court explained, "Appellant has not raised a valid equal protection claim. The threshold prerequisite to an equal protection claim is unequal treatment of persons who are similarly situated [citation], which is absent here. A recidivist previously convicted of a serious or violent felony is dissimilar from a recidivist previously convicted of a nonserious felony in that the former has previously demonstrated a much greater danger to society than the latter. [¶] A defendant who has been convicted of one crime is not in the same position as a defendant who has been convicted of a different crime. [Citation.] Likewise, a recidivist with two prior serious felony convictions is not comparable to a recidivist with prior nonserious felony convictions or a recidivist with one offense of each type, as in the example appellant poses. Violent and serious felony offenses differ from other offenses in many ways, including the reasons and motives of the criminal, the outrage and harm to the victim, and the potential for danger to the victim and society in general. Such differences warrant different treatment. [Citation.] [¶] A person who has committed and been convicted of two serious or violent felonies before the instant offense is a recidivist who has engaged in significant antisocial behavior and who has not benefited from the intervention of the criminal justice system. He is the prototype of the repeat

offender for whom the [T]hree [S]trikes legislation was drafted. It is reasonable for the Legislature to distinguish between those felons, like appellant, who come to court with a history of serious or violent felony convictions and those who do not. Such exercise of legislative discretion cannot be defeated simply by the argument that at the end of a mathematical process the offenders have committed an equal number of serious and nonserious felonies. The Legislature is entitled to treat recidivist felons of the type described in the [T]hree [S]trikes law more harshly than those recidivists who have not yet qualified." (*Id*. at pp. 828-829; accord *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1328-1332.)

We agree with much of *Cooper*'s analysis. But we feel the best response to the argument is that the statutory scheme represents a recognition of the significance of deterrence. An individual with two prior serious or violent felonies – two strikes – who nonetheless commits another felony, has demonstrated an imperviousness to deterrence which it would be folly to ignore. A person whose record includes only one strike conviction has not demonstrated such intransigence. That is a valid legislative consideration.

Edwards – and all those similarly situated – knew that if he committed a new felony he would face life imprisonment. The fact he was willing to engage in felonious conduct despite such horrific consequences identifies him as a more serious threat than the person who had not committed two previous serious or violent felonies, and whose second "strike" felony was therefore not committed in the face of such forceful legislative dissuasion. His third strike consisted not so much in the new crime he committed, but in his rather convincing demonstration that no consequence would deter him from crime. The

Legislature was entitled to conclude that such resistance to deterrence required dire consequences.

The judgment is affirmed.

BEDSWORTH, J.

WE CONCUR:

SILLS, P. J.

O'LEARY, J.